Sarojeanne @ Sulochana Leela d/o Duraisamy & Anor v Dr DM Thuraiappah

HIGH COURT (KUALA LUMPUR) — ORGINATING SUMMONS S2–24–147 OF 1998
KAMALANATHAN RATNAM J
20 JANUARY 2000

Land Law *— Lien — Retention of title deeds — Allegation of loan given to plaintiffs, whether proved — Denial of receipt of advance by plaintiffs — Whether title deed must be returned to plaintiff*

The plaintiffs, the lawful widow and son of the deceased, were joint administrators of the estate of the deceased. Amongst the assets of the deceased was a property in Ampang ('the Ampang property'). Both the plaintiffs' names have been endorsed upon the title to the Ampang property as representatives. By a letter dated 14 March 1989, the United Asian Bank Bhd ('the bank') had granted to the defendant a credit facility. The security that was to be provided was a registered first third party charge in favour of the bank to be created on the Ampang property by the plaintiffs. When the papers were presented to the land office for registration of the charge, they were rejected due to the fact that the plaintiffs' names were registered in the title as representatives and not as registered owners. In the meantime, the bank permitted the defendant to use the overdraft facility. The defendant had utilized the maximum loan facility and claimed that he had released to the second plaintiff, through one K Magathevan, a total sum of RM34,152. In the meantime, the bank informed the defendant of the rejection of the charge. The defendant subsequently resolved the matter with the bank. The bank then agreed to hand over the title deed to the Ampang property to the defendant to be forwarded to the plaintiffs. The plaintiffs prayed for a declaration that the grant in respect of the Ampang property belonged to them and that the defendant returned the same to them. The defendant argued that the bank correctly returned the title to him as he had a lien in respect of the loan he had given to the second plaintiff amounting to RM34,152. The plaintiffs denied receipt of any advance. The second plaintiff testified that the title was loaned to enable the defendant to obtain a loan for his own benefit and he denied that any part of the loan advanced upon the security of the Ampang property was given to him.

Held:

Upon the evidence adduced, the court found that the second plaintiff did not borrow any monies from the defendant and in particular the

A sum of RM34,152 as demanded by the defendant. The court accepted the evidence of the first plaintiff that since the defendant belonged to the same church group as the plaintiffs, and at the request of the defendant, the plaintiffs lent the title to be used as security to enable the defendant to borrow money from the bank. Therefore, there was
B no question of lien setting in because there was no borrowing of any money by the plaintiffs (see p 479B–D).

[Bahasa Malaysia summary

C Plaintif-plaintif, balu yang sah dan anak si mati, adalah pentadbir bersama estet si mati. Antara aset-aset si mati adalah hartanah di Ampang ('hartanah di Ampang'). Kedua-dua nama plaintif telah diindorskan di atas hak milik kepada hartanah di Ampang sebagai wakil-wakil. Melalui surat bertarikh 14 Mac 1989, United Asian Bank
D Bhd ('bank tersebut') telah memberikan defendan kemudahan kredit. Jaminan yang perlu diberikan adalah suatu gadaian berdaftar pihak ketiga yang pertama berpihak kepada bank yang diwujudkan ke atas hartanah di Ampang oleh plaintif-plaintif. Apabila suratcara dikemukakan kepada pejabat tanah untuk pendaftaran gadaian
E tersebut, ia telah ditolak kerana nama-nama plaintif di dalam hak milik adalah sebagai wakil-wakil dan bukan tuan punya berdaftar. Pada masa yang sama, bank telah membenarkan defendan untuk menggunakan kemudahan overdraf tersebut. Defendan telah menggunakan sepenuhnya kemudahan pinjaman dan mendakwa
F bahawa beliau melepaskan wang tersebut kepada plaintif kedua melalui K Magathevan, suatu jumlah sebanyak RM34,152. Pada masa yang sama, bank tersebut telah memberitahu defendan tentang penolakan gadaian tersebut. Defendan kemudian menyelesaikan perkara tersebut dengan bank. Kemudian bank bersetuju untuk menyerahkan hak milik kepada hartanah Ampang kepada defendan
G untuk dikemukakan kepada plaintif-plaintif. Plaintif-plaintif telah memohon suatu deklarasi bahawa geran berkenaan dengan hartanah Ampang adalah dimiliki oleh mereka dan defendan dikehendaki mengembalikannya kepada mereka. Defendan berhujah bahawa bank tersebut telah dengan betul mengembalikan hak milik kepadanya
H kerana beliau mempunyai lien berkenaan pinjaman yang beliau telah berikan kepada plaintif kedua yang terjumlah kepada RM34,152. Plaintif-plaintif telah menafikan penerimaan sebarang pinjaman. Plaintif kedua memberi keterangan bahawa hak milik telah dipinjamkan untuk membolehkan defendan memperolehi pinjaman
I untuk faedahnya sendiri dan beliau menafikan apa-apa bahagian pinjaman yang didahulukan selepas jaminan untuk hartanah Ampang diberikan kepadanya.

Diputuskan:

Di atas keterangan yang dikemukakan, mahkamah mendapati bahawa plaintif kedua tidak meminjam sebarang wang daripada defendan dan secara khususnya jumlah sebanyak RM34,152 seperti yang dituntut oleh defendan. Mahkamah menerima keterangan plaintif pertama bahawa oleh kerana defendan adalah dari kumpulan gereja yang sama seperti plaintif, dan di atas permintaan defendan, plaintif-plaintif telah meminjamkan hak milik untuk dijadikan sebagai jaminan untuk membolehkan defendan untuk meminjam wang daripada bank tersebut. Oleh itu, tiada persoalan mengenai lien yang timbul oleh kerana tiada sebarang pinjaman oleh plaintif-plaintif (lihat ms 479B–D).]

Notes

For cases on lien generally, see 8 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 2313–2337.

Cases referred to

Poomani v Associated Finance Corp Sdn Bhd [1975] 1 MLJ 277 (refd)

Legislation referred to

Contracts Act 1950 s 71

R Kengadharan (*R Kengadharan & Co*) for the plaintiffs.
A Kanesalingam (*Kanesalingam & Co*) for the defendant.

Cur Adv Vult

Kamalanathan Ratnam J:

Facts

The first plaintiff is the lawful widow and the second plaintiff the lawful son of one Rajaratnam a/l Koyil Pillai deceased. Both plaintiffs, as joint administrators of the estate of the said deceased, obtained a grant of letters of administration on 1 April 1980 and the said grant was issued on 14 July 1982. Amongst the assets of the deceased was a property known as No HS (M) 2708, PT No 395 in the Mukim of Ampang with a 99-year lease ('the Ampang property'). Both the plaintiffs' names have been endorsed upon the title to the Ampang property as representatives, as of 31 January 1983. The first plaintiff had on 24 February 1989 granted a general power of attorney to the second plaintiff.

It is also a fact that by a letter dated 14 March 1989 the United Asian Bank Bhd ('the bank') had granted to the defendant a credit facility with a

limit of RM50,000 with the condition that the average monthly credit turnover was RM9,000. The purpose stated was 'For personal investment'. The security that was to be provided was a registered first third party charge for RM50,000 in favour of the bank to be created on the said Ampang property by the first and second named plaintiffs. Incidentally, a valuer's report annexed, showed the value of the said Ampang property at RM100,000. The said charge was executed by both the plaintiffs on 7 April 1989 and witnessed by a common solicitor to both parties. However, when the papers were presented to the land office for registration of the charge on 12 April 1989 the said papers were rejected due to the fact that the plaintiffs' names were registered in the title as representatives and not as registered owners. In the meantime, as soon as the charge was presented for registration, the bank permitted the defendant to use the overdraft facility. The defendant had utilised the maximum loan facility and claimed that he had released to the second plaintiff, through one K Magathevan ('KM') a total sum of RM34,152. In the meantime, only on 20 November 1989, as seen from the documents exhibited in the common agreed bundle of documents (CABD), did the bank write to the defendant informing him of the rejection of the charge and seeking a solution 'to settle your entire liabilities with us'. Subsequently by a letter dated 21 May 1990 the defendant resolved the matter with the bank by:

(1) paying the bank a sum of RM15,850; and

(2) agreeing to pay the balance by securing his clinic's account as security.

The bank then agreed to hand over the title deed to the Ampang property to the defendant 'to hold as stakeholders pending the outcome of the suit to be filed by Dr Thuraiappah against the administrators registered as proprietors and another for recovery of advances alleged to be made by Dr Thuraiappah to them from this account', as stated by the defendant's solicitors in their letter dated 21 May 1990. Since the bank had not returned the said title, the defendant then wrote another letter dated 29 June 1990 seeking the return of the said title 'for my forwarding it to the trustees of the title document because I received it from them'.

The claim

The plaintiffs' claim is for a declaration with costs that the grant in respect of the Ampang property belongs to the plaintiffs and that the defendant who presently has the said grant do forthwith return the same to the plaintiffs.

Findings of the court

Both sides unfortunately have left a lot of questions unanswered. The plaintiffs have never explained why they had to lend the title to the Ampang property to the defendant to enable the defendant to obtain an overdraft. In so far as the evidence goes the defendant was a total stranger to the

plaintiffs. Yet the pleadings disclosed and the evidence led showed that at the request of the defendant the plaintiffs lent the title to be used as security for a loan to be obtained by the defendant for the latter's benefit. A

On the other hand, the defendant has not explained why he would go through so much time and trouble of lending his name as a borrower for an overdraft, using the title to the Ampang property which did not belong to him, and without any reward or recompense, giving the entire proceeds so far obtained from the loan, which he says amounted to RM34,153, to the second plaintiff for his personal use without any letter or guarantee from either or both the plaintiffs indemnifying him from any liability whatsoever. After all, the plaintiffs were total strangers to him. It is obvious to me that neither party has, for reasons best known to either of them, disclosed to this court the true facts. This court therefore has to decide solely on the evidence before it. B C

The first obvious fact to note is that the title is indeed registered in the name of the plaintiffs as representatives. It is not registered in the individual names of the plaintiffs. It is for this reason that the land office refused to register the charge although it was duly executed by the plaintiffs and attested by a solicitor. I shall not consider the part played by the solicitor concerned as that is not an issue raised by either of the parties. Since the land office had rejected the title, the bank negotiated with the defendant and having received satisfaction, returned the title. The defendant argued that the bank correctly returned the title to him as he has a lien in respect of the loan he has given to the second plaintiff amounting to RM34,152.00. The defendant relied on *Poomani v Associated Finance Corp Sdn Bhd* [1975] 1 MLJ 277. It is necessary to look into the facts of *Poomani*. The defendants therein advanced the plaintiff a sum of RM7,000 to enable the plaintiff to settle her loan with the Malaya Borneo Building Society Ltd (MBBS). She did so and obtained a discharge of the charge. The plaintiff and the defendants executed a memorandum of agreement purportedly pursuant to the Moneylenders Ordinance 1951. The plaintiff also executed a charge over the land to the defendants and at the same time handed over the title deeds of the land to the defendants. The defendants took out an order for sale upon non payment of the loan. The plaintiff sought a declaration that the memorandum of agreement and the charge were unenforceable and also sought an order for the delivery of the title deeds to her. The defendants contended that the agreement and charge were enforceable and that they advanced the sum at the plaintiff's request and that they did not do so gratuitously. At the hearing of the order for sale, the court found both the memorandum of agreement and the charge unenforceable. There was no appeal. Therefore when the case for the declaration came up for hearing the unenforceability of the memorandum of agreement and the charge was no longer an issue, being res judicata. Notwithstanding the doctrine of res judicata the court was prepared to consider the issue as to whether the defendant was entitled to a lien over the title deeds until the loan was settled. The court found as a fact that neither in the pleadings nor in her D E F G H I

A evidence did the plaintiff deny that she had benefited from the defendants' grant of the advance of the loan. The court found as a fact that she had benefited and that the defendants had not intended to make the advance gratuitously. In the circumstances, the court rightly applied s 71 of the Contracts Act 1950. The said section reads as follows:

B

> Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.

In the case before me, the plaintiffs deny receipt of any advance. In fact the C second plaintiff who testified on this issue was categoric that the title was loaned to enable the defendant to obtain a loan for his own benefit and he denied that any part of the loan advanced upon the security of the said Ampang property, was given to him. I had watched the second plaintiff testify. I had paid particular attention to his evidence to see if there was any truth in the defendant's contention. As between the two protagonists I find D the second plaintiff a simpleton, who gave his evidence in fluent Bahasa in a forthright and candid manner. I had no reason to doubt him. On the other hand, the defendant is no country bumpkin. He is a medical doctor trained to perceive and foresee. I cannot accept his evidence that he paid the sum of RM34,152 being the proceeds of the loan, to a third party, namely to one E KM, to give to the second plaintiff. The defendant has even seen the need to obtain two acknowledgements from the said KM, who signed the receipts for the said sums, for and on behalf of the second plaintiff. The first acknowledgement dated 17 April 1989 was for a sum of RM20,152. The defendant testified that the second plaintiff asked for another loan of RM10,000 for his wedding and yet again the same KM acknowledged F receipt of the sum of RM10,000 on 5 October 1989 purportedly for the benefit of the second plaintiff. However, the said receipt signed by KM states that he received the sum of RM10,000 on 5 October 1989 from the defendant 'as payment towards the account of the loan taken from UAB ...'. The defendant insisted that this sum was for the second plaintiff's wedding expenses and when asked by his counsel why he gave the money to KM and G not to the second plaintiff personally he said it was because he 'trusted Magathevan more than I trusted the second plaintiff'. As I said earlier the defendant is not a gullible simpleton. Having confirmed that he had less trust on the second plaintiff, he did not insist that the second plaintiff ought to personally sign acceptance of the sums by signing the receipts. The H defendant's case was that the second plaintiff had transferred his house in Taman Subang ('the Subang property') in the name of KM sometime in 1987 or 1988. The reason for the transfer was because the second plaintiff had difficulty in servicing the instalment payments with MBBS. So he approached KM to help him by transferring the said property to his name and to hold the property until the second plaintiff was eligible for a I government loan when KM was to transfer the said property back to the second plaintiff. When KM was asked by his counsel why he did all this and what benefit he was to accrue for doing this, his bland answer was that there

was no benefit. He merely helped his friend since MBBS was trying to foreclose the Subang property. He confirmed that there was a deed of assignment and that he was indeed paying the monthly instalments. When asked why he was paying the instalments he testified that it was because the second plaintiff had defaulted in payment and the bank was harassing him. However he agreed that the monthly instalments were to be paid from the rentals collected from the said Subang property. Whilst the rental was between RM600 to RM700 per month, the monthly instalment due to MBBS was RM1,000. And he paid the difference since the second plaintiff did not do so. It was due to this impasse that KM advised the second plaintiff that they should approach his friend, the defendant, who would help. The second plaintiff of course has denied all this.

What I cannot understand is that if it is such a straight-forward story as the defendant and his witness, KM, have presented to the court, why did they not require the second plaintiff to sign an agreement to this effect, disclosing the true facts. As I said earlier, there are so many missing pieces in this jig-saw puzzle that the parties have not presented to this court. However, on the paucity of evidence led by the defendant, I have to reject his version of the story. It is too good to be true that KM would without any rhyme or reason and without any benefit accruing to himself take over the burden of paying off some other person's debts to his own loss and detriment. However, he maintained that other than the sum of RM10,000 paid to the second plaintiff for his wedding, the balance of the sum of RM24,152 was paid to settle the MBBS loan. There are so many gaps in the defendant's story that I am compelled to disbelieve it totally. KM testified that even after paying off the said sum of RM24,152.00 there was a deficit of over RM30,000. MBBS then drew a separate agreement with him by which he obtained a fresh loan and he repaid the sum by monthly instalments. The second plaintiff testified that he actually sold the Subang property to KM for RM180,000. Out of this he used RM40,000 to settle the MBBS loan and the balance he used to 'enjoy' and to save. There is no reason for me to reject this evidence especially since there is evidence that KM had indeed obtained a loan from MBBS to purchase the same property. I have no hesitation in accepting the second plaintiff's version. In any case, when KM testified that he had suffered a loss of RM30,000 due to the deficit, he never attempted to claim this sum from the second plaintiff. He did not even send a notice of demand let alone sue. It is my judgment that even true friendship has its limits. Surely he himself being a wage earner, KM would not have agreed to be in debt for RM30,000 without at least demanding this sum from his friend, the second plaintiff. This story of the defendant and KM is too hollow and cannot be believed.

Another interesting fact that dispels the defendant's story is that on 6 February 1991 he had instructed his present solicitors to send a demand notice addressed firstly to KM and then to both the present plaintiffs. In that notice he even demanded the sum of RM34,152 from KM contending that it was a loan to him. When cross-examined as to why he did not pursue

A the matter against KM, he testified that he did not wish to bring legal proceedings against a close friend. The defendant's case is pathetic. On the one hand he contends that he did not wish to sue a close friend, yet he had sent him a notice of demand. More than six years later he uses this same person as his key witness. This court cannot help but conclude that KM is a witness of convenience for the defendant. I have watched KM and the B defendant testify. I do not accept their evidence as supportive of their case.

In the circumstances, it is my judgment and I find upon the evidence adduced, that the second plaintiff did not borrow any monies from the defendant and in particular the sum of RM34,152 as demanded by the defendant. I accept the evidence of PW1, that is, the first plaintiff, who C testified that since the defendant belonged to the same church group as the plaintiffs, and at the request of the defendant, the plaintiffs lent the title to be used as security to enable the defendant to borrow money from the bank.

D *Limitation*

Since I have held that there is no question of lien setting in because of my finding that there was no borrowing of any money by the plaintiffs, I have to consider the question of limitation. The demand notice sent by the defendant to the plaintiffs and to KM was dated 6 February 1991 wherein he demanded the sum of RM34,152 with interest at the rate of 10.25% pa E and a penalty interest of 1%. Having sent the said notice the defendant did nothing. To my mind, the claim by the defendant has already been extinguished by effluxion of time, since six years have set in. The argument of the defendant that the plaintiffs had schemed into claiming the title deed only after the expiry of the period of limitation so that they need not have to F pay the loan is unacceptable. The defendant had no right to retain the title in any case as there was no legal lien. Therefore there is no question of time running against the plaintiffs in claiming their title to the property unlike the defendant who was clearly caught by the defence of limitation. In any case even the defendant had clearly expressed his desire to the bank by his letter dated 29 June 1990 to return the title deed to the plaintiffs 'for my G forwarding it to the trustees of the title document because I received it from them'. With such clear expression of an intention to return the title deed to the plaintiffs without stipulating his right to a lien, if any, the defendant had clearly misrepresented to the bank a false intention on his part. Having falsely represented to the bank that he wanted to return the title deed to the plaintiffs he then wrongfully retained it on the pretext of a lien. I do not H know whether the bank would have released the title deed to the defendant if he had intimated to it that he intended to retain the title deed on the basis of a lien until the second plaintiff had settled the alleged debt. Perhaps the defendant had his own reasons for not disclosing this to the bank.

Whilst I am aware that it is trite law that when a creditor has a lien over I goods by way of security for a loan, he can enforce the lien to obtain satisfaction of the debt even though an action thereon would be time barred, this principle would not apply to this case as I have already held that there

is no legally enforceable lien to benefit the defendant. I therefore allow the plaintiffs' prayers for declarations sought, with costs.

Order accordingly.

Reported by Jafisah Jaafar